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No. 96-1479

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROSARIO STRANO AND VITO STRANO,
dba STRANO FARMS, PETITIONERS

v.

DEPARTMENT OF JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the inclusion of back pay as one component of the relief awarded against petitioners in administrative proceedings under the Immigration Reform and Control Act of 1986 violated petitioners' rights under the Seventh Amendment.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1) is unpublished, but the decision is noted at 98 F.3d 1353 (Table). The opinion of the administrative law judge (Pet. App. 2-42) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on September 27, 1996. A petition for rehearing was denied on December 18, 1996. Pet. App. 43-44. The petition for a writ of certiorari was filed on March 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration Reform and Control Act of 1986 (IRCA), Pub. L. No. 99-603, Tit. I, 100 Stat. 3360, amended the Immigration and Nationality Act (INA) to prohibit employers from knowingly hiring aliens who are not authorized to work in the United States. INA § 274A, 8 U.S.C. 1324a.[1] The Act further requires employers to verify the employment eligibility of individuals hired after the effective date of the Act. 8 U.S.C. 1324a(a)(1)(B), 1324a(b). Employers comply with the verification requirement by preparing, for each new employee, an Employment Eligibility Verification Form, which requires the employer to certify that it has examined any of several specified forms of documentation, provided by the employee, to verify the employee's identity and eligibility for employment. 8 U.S.C. 1324a(b); 8 C.F.R. 274a.2(a). These provisions are enforced by the Attorney General through special administrative proceedings or, in cases involving a pattern or practice of violations, through civil or criminal actions in federal court. 8 U.S.C. 1324a(e)-(f).

To address fears that IRCA's imposition of employer sanctions would lead to employment discrimination against aliens who were, in fact, authorized to work, or against persons of particular national origins, Congress specifically defined such discrimina-

[1] Sections 274A and 274B of the INA (discussed below) have been amended since the time of the violations involved in this case. See, *e.g.*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, §§ 412, 421, 110 Stat. 3009-666, 3009-670. Unless otherwise noted the amendments are not pertinent here, and we cite the version of the Act reprinted in the 1994 edition of the United States Code.

tion as an "unfair immigration-related employment practice." 8 U.S.C. 1324b(a)(1); see H.R. Rep. No. 682, 99th Cong., 2d Sess., Pt. I, at 68-70 (1986). In 1990, Congress amended the Act to specify that asking an employee or job applicant to provide "more or different documents" than those specified as acceptable by the Act or its implementing regulations, or "refusing to honor documents tendered that on their face reasonably appear to be genuine," is to be treated as an unfair practice. 8 U.S.C. 1324b(a)(6) (as added by the Immigration Act of 1990, Pub. L. No. 101-649, Tit. V, § 535(a), 104 Stat. 5055).[2]

IRCA provides for appointment by the President, with the advice and consent of the Senate, of a Special Counsel for Immigration-Related Unfair Employment Practices within the Department of Justice. 8 U.S.C. 1324b(c). An individual (or government agent) who believes that an employer has engaged in an unfair immigration-related employment practice may file a charge with the Special Counsel, who is required to investigate the charge and to decide whether or not to bring a complaint before an administrative law judge (ALJ). 8 U.S.C. 1324b(b)(1), (c)(2), and (d)(1). The Special Counsel is "responsible * * * in respect of the prosecution of all such complaints" (8 U.S.C. 1324b(c)(2)), which are to be heard by specialized administrative law judges

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[2] These practices are generally referred to collectively as "document abuse." IIRIRA § 421, 110 Stat. 3009-670, amended this provision to specify that such a request or refusal to honor is an "unfair immigration-related employment practice" only "if made for the purpose or with the intent of discriminating against an individual in violation of" 8 U.S.C. 1324b(a)(1). That amendment is effective to "requests made" on or after September 30, 1996.

(8 U.S.C. 1324b(e)(2)).[3] An ALJ who finds that an employer committed an unfair practice is required to enter a cease-and-desist order directed to the employer. 8 U.S.C. 1324b(g)(2)(A). The ALJ may also order the employer to comply with the law; to retain certain additional records; to hire individuals directly and adversely affected by the employer's violation, "with or without back pay"; to pay civil penalties according to a graduated schedule specified in the Act; to post notices to employees concerning their rights and the employer's obligations under the Act; to educate employer personnel involved in hiring about the Act's requirements; and, in appropriate cases, to lift restrictions imposed on an employee and to expunge inappropriate records from an employee's personnel file. 8 U.S.C. 1324b(g)(2)(B). The ALJ's orders are subject to review in the court of appeals, and final orders may be enforced by the court of appeals or by a federal district court. 8 U.S.C. 1324b(i)-(j).

2. In March 1993, six farm workers filed charges with the Office of the Special Counsel (OSC), alleging that petitioners had engaged in unfair immigration-related employment practices. Pet. App. 3. After investigating the charges, the OSC filed a complaint (*id.* at 56-71) with the Office of the Chief Administrative Hearing Officer in the Justice Department's Executive Office for Immigration Review. The complaint alleged that petitioners had violated 8 U.S.C.

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[3] If the Special Counsel fails to file a complaint within 120 days after receiving a charge, the charging party may file such a complaint directly with the ALJ within 90 days after receiving notice of the Special Counsel's decision. 8 U.S.C. 1324b(d)(2).

1324b(a)(6) by requiring the charging parties to present more or different documents than are required under the INA to establish employment eligibility, and by refusing to honor documents tendered by the charging parties that on their face reasonably appeared to be genuine. Pet. App. 56-59. The complaint further alleged that petitioners had engaged in a pattern or practice of similar document abuse and of related discrimination on the basis of citizenship status, in violation of 8 U.S.C. 1324b(a)(1) and (6). Pet. App. 60-61. The complaint requested a variety of injunctive relief, the assessment of substantial civil penalties, and an order requiring petitioners to pay "back pay" to the charging parties. *Id.* at 61-62.

The OSC's complaint was referred to an administrative law judge. See 8 U.S.C. 1324b(e). The parties then engaged in "spirited" discovery. Pet. App. 8. Three of the original six charging parties were dismissed from the case, on OSC's motion, because they failed to appear for depositions and showed little interest in pursuing the matter. *Id.* at 5.

After rejecting petitioners' request for a jury trial (Pet. App. 74-79), the ALJ conducted an evidentiary hearing (see *id.* at 5). Based on the evidence at that hearing and the parties' additional submissions, the ALJ found that petitioners had committed the charged violations of the INA. *Id.* at 2-33. The ALJ entered an order (*id.* at 40-41) requiring petitioners to cease and desist from violating the relevant provisions. With respect to the document abuse violations involving the three remaining charging parties, the ALJ ordered petitioners to pay a civil penalty of $750, and to pay two of the three individuals involved a total of $9,919 in "back pay" and interest. *Id.* at 40-41. With respect to the "pattern or practice" counts of the

complaint, the ALJ ordered petitioners to pay the government civil penalties totalling $101,000.

3. On judicial review pursuant to 8 U.S.C. 1324b(i), the court of appeals summarily affirmed the ALJ's decision. Pet. App. 1.

ARGUMENT

The Office of the Special Counsel (OSC), specifically created by Congress to handle cases involving "unfair immigration-related employment practice[s]" prohibited by the Immigration and Nationality Act (INA) (see pages 4-5, *supra*), brought an administrative complaint against petitioners charging, among other things, that petitioners had committed "document abuse" violations with respect to three named individuals. The resulting order, entered by an administrative law judge (ALJ) after a full evidentiary hearing, required petitioners to stop violating the law, and to pay the government civil penalties of $750 based on those specific violations and $101,000 based on petitioners' "pattern or practice" of noncompliance. Petitioners contend (Pet. 17) that these proceedings deprived them of a Seventh Amendment right to trial by jury, because the ALJ's order also required them to pay two of the aggrieved individuals a total of $9,919 in "back pay" and interest. That contention does not merit review.

1. "Congress has often created new statutory obligations, provided for civil penalties for their violation, and committed exclusively to an administrative agency the function of deciding whether a violation has in fact occurred." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 450 (1977). That is what Congress did when it created the obligations and administrative enforce-

ment procedures at issue in this case. See pages 2-4, *supra*. As this Court has long recognized, "the Seventh Amendment is generally inapplicable in administrative proceedings, where jury trials would be incompatible with the whole concept of administrative adjudication." *Pernell* v. *Southall Realty*, 416 U.S. 363, 383 (1974) (quoted in *Atlas Roofing*, 430 U.S. at 454). Thus, "when Congress creates new statutory 'public rights,' it may assign their adjudication to an administrative agency with which a jury trial would be incompatible, without violating the Seventh Amendment's injunction that jury trial is to be 'preserved' in 'suits at common law.'" *Atlas Roofing*, 492 U.S. at 455; see *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. 33, 51-55 & n.10 (1989) (defining "public rights"); see also *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582-594 (1985) (discussing "public rights" in rejecting Article III challenge to administrative adjudication scheme); *CFTC* v. *Schor*, 478 U.S. 833, 847-858 (1986) (same).

Sixty years ago, in *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48-49 (1937), the Court rejected a Seventh Amendment challenge to an order of the National Labor Relations Board that required an employer, among other things, to "make good the[] losses in pay" suffered by certain employees who had been injured by "unfair labor practices" proscribed by the National Labor Relations Act, 29 U.S.C. 151 *et seq.* 301 U.S. at 22. Although petitioners do not cite *Jones & Laughlin*, the administrative procedures they challenge are strikingly similar to those upheld in that case. Compare 8 U.S.C. 1324b with 29 U.S.C. 160; see also *Atlas Roofing*, 430 U.S. at 453 & n.10 (discussing *Jones & Laughlin* in rejecting Seventh Amendment challenge to administrative adjudication,

including assessment of civil penalties, under the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*). There is no reason for a different result here.

2. Petitioners contend (Pet. 14-17) that Congress may not provide for back pay awards in administrative proceedings under 8 U.S.C. 1324b because such awards involve the adjudication of "private rights," as this Court defined that term in *Granfinanciera, S.A.* v. *Nordberg*, 492 U.S. at 51-55 & n.10. That is incorrect.

Cases brought to enforce the regulatory provisions of Sections 1324a and 1324b involve "public rights," because they "involv[e] statutory rights that are integral parts of a public regulatory scheme and whose adjudication Congress has assigned to an administrative agency." *Granfinanciera*, 492 U.S. at 55 n.10. As described above (pages 2-4, *supra*), the INA imposes sanctions on employers who hire persons not eligible to work in this country, and mandates particular means by which employers must verify eligibility. Because those sanctions might, by themselves, have undesired effects, the Act creates a new category of proscribed acts—"unfair immigration-related employment practices"—and provides a variety of associated remedies. Complaints are to be reported to and investigated by an administrative office created specifically for that purpose, and adjudicated by selected administrative law judges who not only specialize in the area of immigration but have received "special training respecting employment discrimination." 8 U.S.C. 1324b(e)(2).

Moreover, in this case, as in most cases under Section 1324b, the administrative action to remedy violations of the Act was brought by the Special

Counsel, whose office was created by Congress for that purpose. Thus, "th[e] statutory cause of action inheres in * * * the Federal Government in its sovereign capacity" (492 U.S. at 53), and the case "arise[s] between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive * * * department[]" (*id.* at 51 n.8). See also *Atlas Roofing*, 430 U.S. at 458 ("public rights" cases include those in which "the Government is involved in its sovereign capacity under an otherwise valid statute creating enforceable public rights.").[4]

Finally, the bulk of the relief available under the Act, such as the cease-and-desist order and civil penalties (payable to the government) obtained in this case (Pet. App. 40-41), is unquestionably "public" in nature. See page 4, *supra*. The character of the proceeding does not change because the Act also confers on the ALJ the incidental power to award back pay to individuals as one component of an administrative remedial order sought and obtained by the Special Counsel. See 8 U.S.C. 1324b(g)(2)(B) ("Such an order also may require the person or entity — * * * (iii) to hire individuals directly and adversely affected, with or without back pay."); *Jones & Laughlin*, 301 U.S. at 48-49. Petitioners' contention that this case involves "private rights" is therefore without merit.

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[4] The administrative proceeding against petitioners was brought and prosecuted by the Special Counsel. See Pet. App. 2, 56, 62. This case therefore presents no question concerning cases brought and prosecuted solely by aggrieved individuals. See note 3, *supra*; compare *Granfinanciera*, 492 U.S. at 65-71 (Scalia, J., concurring in part and in the judgment).

3. Petitioners' argument (Pet. 11) that *Chauffeurs, Teamsters and Helpers Local No. 391* v. *Terry*, 494 U.S. 558 (1990), established "[t]he nature of back pay awards as common law or common-law analogous claims, carrying a right to jury trial" under the Seventh Amendment is similarly incorrect, and contradicted by the holding in *Jones & Laughlin*. *Terry* involved a suit brought in district court by private parties seeking monetary damages. See 494 U.S. at 562-563. This case, by contrast, involves a proceeding brought by a government officer before a specially constituted administrative tribunal, created by Congress for the sole purpose of "supplying speedy and expert resolutions of the issues involved." *Atlas Roofing*, 430 U.S. at 461; see pages 3-4, *supra*. This Court has recognized that that distinction is important for Seventh Amendment purposes. *Atlas Roofing*, 430 U.S. at 460-461; *Granfinanciera*, 492 U.S. at 51-53 & n.9; *Curtis* v. *Loether*, 415 U.S. 189, 194-195 (1974). Because adjudication of "unfair immigration-related employment practices" claims involves "public" rather than "private" rights, Congress's choice of forum forecloses petitioners' argument.[5]

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[5] For the same reason, there is no merit to petitioners' passing argument (Pet. 7, 13) that the decision in this case conflicts with *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965), and *Lewis* v. *Times Publishing Co.*, 185 F.2d 457 (5th Cir. 1950), which held that jury trials are required in district court suits to recover amounts that should have been paid by an employer under the Fair Labor Standards Act. See also *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) (adopting as precedent all decisions of the former Fifth Circuit handed down before October 1, 1981); *Davis* v. *United States*,

In addition, of course, the Seventh Amendment applies only to proceedings involving "legal," rather than "equitable," rights and remedies. *E.g. Terry*, 494 U.S. at 564-565. In holding that employees who sued their union in district court, alleging breach of the union's duty of fair representation, were entitled to a jury trial of their claim for damages (measured by wages lost because of the breach), the Court specifically rejected the suggestion that "any award of monetary relief must *necessarily* be 'legal' relief." 494 U.S. at 570 (quoting *Curtis*, 415 U.S. at 196). The Court distinguished the damages sought from the union, which had never employed the plaintiffs, from back pay awarded against an employer, which might constitute, or be incidental to, restitution or other equitable relief. 494 U.S. at 570-572. That distinction is consistent with *Jones & Laughlin*, which held (301 U.S. at 48), in the specific context of an administrative back pay award, that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law." As this case demonstrates, back pay awards under Section 1324b are an incidental part of the overall equitable relief available under the Act.[6]

Indeed, the *Terry* Court was willing to assume—on the basis of considerable authority—that even back

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417 U.S. 333, 340 (1974) (intra-circuit conflicts); *Wisniewski* v. *United States*, 353 U.S. 901 (1957) (per curiam).

[6] The fact that a back pay award may not be coupled with a reinstatement order in a particular case does not change the analysis. See *Atlas Roofing*, 430 U.S. at 453 n.10; see also *Radio Officers' Union of Commercial Telegraphers Union* v. *NLRB*, 347 U.S. 17, 54-55 (1954) (NLRB may order back pay without ordering reinstatement).

pay awarded to a private plaintiff in a civil damage action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, is "equitable" rather than "legal" relief for purposes of the Seventh Amendment. *Terry*, 494 U.S. at 571-572 (citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415-419 (1975), and *Lorillard* v. *Pons*, 434 U.S. 575, 581-582 (1978)); see also *Lehman* v. *Nakshian*, 453 U.S. 156, 164 (1981) ("[O]f course, * * * there is no right to trial by jury in cases arising under Title VII."); but see *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 252 n.4 (1994) (reserving the issue). Any relief that could be awarded by an Article III court in the absence of an underlying jury verdict could, a fortiori, be awarded by an administrative tribunal without violation of the Seventh Amendment. See *Granfinanciera*, 492 U.S. at 53-54. Thus, there is no inconsistency between this Court's discussion in *Terry* and Congress's decision to provide for administrative factfinding in the administrative proceedings at issue in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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